Office - Supreme Court, U.S.
FILED
SEP 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. TO OPPOSITIONS TO PETITION FOR CERTIORARI

---

*Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006
(202) 785-0611

Attorney for the Petitioner
Arizona Electric Power
Cooperative, Inc.

*Counsel of Record

September 27, 1982

DI CESARE - Printing — 881-6101 — Washington, D.C. 20006

TABLE OF AUTHORITIES

Cases: **Page**

Camp v. Pitts, 411 U.S. 138 (1973) 9

Columbia Gas Development Corp. v. FERC, 651 F.2d 1146, 1155-59 (5th Cir.1981) 8

Commissioner of Internal Revenue v. Brown, 380 U.S. 563 (1965) 7

FPC v. Texaco, Inc., 417 U.S. 380 (1974) 9

Mid-Louisiana Gas Co., v. FERC, 664 F.2d 530 (5th Cir. 1981) 2, 3, 4, 5, 7

Pennzoil Co. v. FERC, 645 F.2d 360, 380 (5th Cir. 1981) 8

Pennzoil Co. v. The Public Service Commission of West Virginia, No. 80-175-G-42T, (S.Ct. App. W. Va., 1982) 9

SEC v. Chenery, 322 U.S. 194 (1947) 9

Tenneco Oil Co. v. FEA, 613 F.2d 298 (TECA. 1979) 7

Statutes:

Natural Gas Act, 15 U.S.C. §717 *et seq* 8

Section 4, 15 U.S.C. 717c 8

Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq* ..... *passim*

Section 2, 15 U.S.C. 3301 7
Section 2(20), 15, U.S.C. 3301 (20) 5
Section 2(22), 15 U.S.C. 3301(22) 6
Section 102(b), 15 U.S.C. 3312(b) 3
Section 102(c)(1)(B)(ii), 15 U.S.C. 3312(c)(1)(B)(ii) 3
Section 104, 15 U.S.C. 3314 3

Section 108, 15 U.S.C. 3318 3
Section 121(a)(1), 15 U.S.C. 3331(a)(1) 3

FERC Regulations and Orders:

18 C.F.R. 2.66(a)(4) 5

18 C.F.R. 154.42(b)(2)(ii) 5

Order No. 58, Docket No. RM80-7 (issued November 14, 1979) 8

Order No. 98, Docket No. RM80-6 (issued August 4, 1980) 5, 8, 10

Miscellaneous:

Uniform Commercial Code, § 1-201(44) 7

Black's Law Dictionary (5th Ed.) 6, 7

Statistics of Natural Gas Interstate Pipeline Companies—1980, U.S. Department of Energy, issued October 1981 2

S. Rep. 95-1126, 95th Cong., 2d Sess p. 59 6

No. 81-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

REPLY OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. TO OPPOSITIONS TO PETITION FOR CERTIORARI

Our petition asserted that this case involves many billions of dollars to consumers and will affect prices for pipeline produced gas for many years. Respondents attempt to demonstrate that only a small amount of gas is involved, prices paid by consumers will not be greatly increased and the price impact will be only for a few years. This short reply will rebut these claims.

In our view, respondents' many arguments do not impair the validity of our reasons for the granting of certiorari. However, we have argued that this Court should reverse the decision below by issuing a *per curiam* opinion. Therefore, this reply will also rebut respondents' claim that this is not an appropriate case for summary reversal. Finally, we will show direct conflict between a federal and state court.

1. Respondents unite in the general argument[1] that our claims of a multi-billion dollar adverse impact on consumers are exaggerated. But, in the nine months since the decision of the Court below, 7 pipelines have filed for rate increases under *Mid-Louisiana*[2] totaling more than one-half of a billion dollars.[3] The Commission estimates that over the life of the pipeline owned reserves at issue, the decision below will cost consumers between $2 and $3 billion.[4] However, this estimate ignores certain relevant factors which will surely increase the cost of the *Mid-Louisiana* decision to consumers by many additional billions of dollars. Thus, that estimate reflects rate increase filings by only seven pipelines which together account for only 69.4% of all pipeline owned gas reserves. It excludes the 19 other pipelines which own the remaining 30.6% of such reserves.[5] When these other pipelines file for rate increases based on *Mid-Louisiana*, the annual impact is certain to increase. If this increase bears the same relationship to gas reserves as is reflected in the filings already made, the annual impact would increase from $181 to $261 million.[6]

---

[1] e.g., Mid-Louisiana Br. in Opp. 26-28.

[2] *Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530 (5th Cir. 1981).

[3] Reply Memorandum of Federal Energy Regulatory Commission (Commission), Appendix A.

[4] Reply Memorandum, p. 1.

[5] *Statistics of Interstate Natural Gas Pipeline Companies--1980*. U.S. Department of Energy, issued October 1981. Appendix H (p. H-2) shows that pipeline owned reserves on producing gas lands totaled 11,501,215 MMcf. The pipelines listed in Appendix A to the Reply Memorandum held the following reserves according to that same table: Consolidated-394,483; Colorado-801,809; El Paso-5,826,889; Kentucky-W.Va.-184,003; Kansas-Nebraska-602,108; Mid-Louisiana-69,214; and Michigan-Wisconsin-107,439. This is a total of 7,985,945 MMcf--or 69.4% of total pipeline owned reserves.

[6] This figure is derived by dividing the $181,257,323 annual impact shown in Appendix A to the Reply Memorandum by the 69.4% of reserves owned by the pipelines who filed for those rate increases, multiplying by 100, and thus obtaining the total increase in rates.

The Commission's estimates also assume that the differential between NGPA and cost of service rates for pipeline production will remain constant. But, under the NGPA, wells are classified in different pricing categories. Wells can be, and are, reclassified from lower to higher priced categories. Such reclassification is significant with respect to pipeline production because so much of it is derived from "old wells" (drilled before January 1, 1973) on "old" leases (acquired before October 8, 1969). These older wells are usually classified in NGPA Section 104[7], but as they are depleted and production declines to below 60 Mcf per day, these wells are reclassified under Section 108 as "stripper wells." The dollar impact of such reclassification is substantial. For example, in the case of El Paso Natural Gas Company, revenues are 3.42 times greater for Section 108 gas than for Section 104 gas.[8]

Mid-Louisiana makes other cost of service gas wells eligible for initial classification in Section 104 and for later reclassification in other "high cost" gas sections of NGPA.[9] This "category creep" will continue over the productive lives of gas reserves owned by pipelines. Again, using El Paso as an example, that pipeline made two purchased gas adjustment

---

[7] Section 104, titled "Ceiling Prices for Sales of Natural Gas Dedicated to Interstate Commerce," includes gas flowing before the enactment of the NGPA which was dedicated to interstate commerce.

[8] The latest purchased gas adjustment filing by El Paso in Docket TA83-1-33, dated September 1, 1982, shows an average "value" of Section 104 self-produced gas to $1.25, while the average price for Section 108 is shown as $4.30. Enclosure No. 4, Schedule A, Sheet 1.

[9] Section 102(b) establishes a maximum ceiling price for first sales of "new" natural gas. "New" natural gas is defined in §102(c)(1)(B)(ii) *inter alia* as gas from a depth of 1000 feet or more below an existing well. Thus, the mere redrilling of an old well to a depth of 1000 feet or more below the depth of the existing well will cause that well to become a new well eligible for deregulated prices on January 1, 1985. §121(a)(1) of the NGPA, 15 U.S.C. 3331(a)(1).

clause filings in 1982,[10] both of which included its own production priced at NGPA rates pursuant to the *Mid-Louisiana* decision.

These two filings were made only six months apart, yet the percentage of Section 104 gas to total produced gas declined from 51.8% in the first year to 44.3% in the second.[11] In addition, the price of Section 104 gas rose by only 1¢ per Mcf, while the average price of gas in all other categories of NGPA gas rose by 44¢ per Mcf.[12] Plainly, the Commission's figures do not reflect the full impact of gas well reclassification.

Respondent Mid-Louisiana finds the temerity to argue[13] that our estimates of the adverse dollar impact of NGPA pricing of pipeline produced gas "are grossly exaggerated." Yet, Mid-Louisiana's own rate filing shows that its revenues on its own production under NGPA rates are *16.25 times* its revenues under cost of service rates.[14]

Respondents' argument[15] that the Court should disregard

---

[10] *El Paso Natural Gas Company*, Docket TA82-2-33, filed March 1, 1982, and Docket TA83-1-33, filed September 1, 1982.

[11] Docket TA82-2-33, Enclosure No. 6, Schedule B; Summary, and Docket TA83-1-33, Enclosure No. 4, Schedule A, Sheet 1. The former Docket shows that 9,571,809 Mcf out of 18,491,695 Mcf were classified in Section 104, or 51.8%. The latter Docket classified 33,501,329 Mcf out of 75,552,812 Mcf in Section 104, or 44.3%. (The difference in relative volumes in the two filings is due to a change from a one month estimated basis to a six month estimated basis.)

[12] *Id.* The "value" of Section 104 gas was $1.24 in the first Docket and $1.25 in the second. The unweighted average of all other categories was $4.33 in the first Docket and $4.77 in the second.

[13] Br. in Opp. 26-27; the same argument is made by El Paso Natural Gas Co., Br. in Opp. 20.

[14] *Mid-Louisiana Gas Company*, Docket TA82-2-15, Exhibit A, which shows a total cost under NGPA rates for 3,800,000 Mcf of that pipeline's production is $10,970,000 versus $675,000 for the same production under cost of service rates.

[15] Kansas-Nebraska Br. in Opp. 15-16.

this huge economic impact because it is only a small part of the total increased rates payable by consumers to *independent producers* is irrelevant. This increase is payable to *pipeline producers* and Congressional intent to afford an incentive to the former does not prove that it had a similar intent with respect to the latter. Even the Court below admitted that there was no clear evidence of Congressional intent to increase prices payable to pipeline producers.[16]

In our view, this multi-billion dollar impact shows that this case is of national importance even if respondents were correct in their further claim that *Mid-Louisiana* affects only gas produced from wells in a declining universe composed of "old" (pre-1973 wells) on "old" (pre-October 8, 1969) leases. But, respondents err in this claim too. The Commission's Order 98, which was vacated by *Mid-Louisiana*, provided that gas produced by *new wells* located on "cost of service leases" would not receive NGPA prices. Thus, Section 154.42(b)(2)(ii) excluded from NGPA rate treatment "natural gas produced from *leases* acquired before November 15, 1979, *which have ever been granted cost of service treatment* pursuant to §2.66(a)(4) of this chapter or pursuant to a settlement approved by the Commission in lieu of a finding of special circumstances under that section." (Emphasis added; Pet. App. B-48).

It is clear that Order 98 applied equally to the declining universe of old wells on old leases and the expanding universe of new wells on *any* leases which had ever been granted cost of service treatment.

2. We argued (Pet. 15-18) that an intracorporate transaction did not constitute a "sale" as defined by Section 2(20) of the NGPA and therefore the Court below erred in holding that there was a statutory "first sale." AEPCO was joined in this

---

[16] 664 F.2d 530, 536 (5th Cir. 1981).

argument[17] by 3 petitioners[18] and 4 *amici*.[19] Only two respondents even discussed this claim which is the dispositive issue here. Of these, only one claims that an intracorporate transfer of pipeline produced gas can meet the literal language of the "sale" definition of NGPA.

Thus, El Paso argues (Br. in Opp. 13) that Congress defined the term "sale" in the disjunctive to include a sale, an exchange "or other transfer for value." The short answer to this claim is that the Conference Committee stated "[t]he definitions provided in the Act are generally self-explanatory, except as noted." S.Rep. 95-1126, 95th Cong., 2d Sess., p. 59.

Clearly, a definition is only self-explanatory if the ordinary meaning of the words used therein applies. Since there is no explanation of the definition of sale in the legislative history, it is clear that Congress intended the ordinary meaning of the words "sale," "exchange," and "transfer for value" to apply. El Paso focuses on only the term "transfer for value" and imputes to it an artificial meaning which is at war with its conventional meaning. A transfer is the passing of property from one person to another, *Black's Law Dictionary* (5th Ed., p. 1342).[20]

Since a single corporation is only one entity, the intracorporate transaction between its producing division and its transmission division clearly is not a transfer. Furthermore, the second element of a conventional "transfer for value" is also absent. The term "value" is

---

[17] AEPCO alone made this argument in the Court below, but the Court there completely ignored it. Had that Court considered it, we are confident that a different result would have been reached.

[18] Commission Br., p. 16; New York Br., pp. 16-17; Michigan Br., pp. 10-15.

[19] Pennsylvania Public Utilities Commission Br., p. 3; Public Power Group Br., pp. 5-6; Associated Gas Distributors Br., pp. 5-6; California Public Utilities Commission Br., pp. 8-11.

[20] This conclusion is made applicable to pipeline production by §2(22) of the NGPA which defines the term "delivery" in the context of a first sale as meaning "...the physical delivery *from the seller* ..." (emphasis added). There is, of course, no seller in an intracorporate transaction.

synonymous with consideration."[21] *Black's Law Dictionary* (5th Ed., p. 1391).

We have shown that the specific legislative history of the definition section of the NGPA, Section 2, requires that the language of each of the definitions be construed by reference to its ordinary meaning. However, even if this compelling circumstance were absent, there is a general rule of statutory construction which requires that language in a federal statute be given its ordinary meaning and this principle has been specifically applied to a statute which defines the word "sale" and "exchange." Thus, El Paso's claim that the term "transfer for value" should not be given a meaning consistent with common law or state law principles is expressly rebutted by this Court's holding in *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563, 571 (1965), where this Court applied the principle that:

> Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words "sale" and "exchange" are not to be read any differently. (Citation omitted).

In interpreting the terms sale and exchange as they are used in the Internal Revenue Code, the Court then defined those terms in the following fashion:

> 'A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent'...is a contract 'to pass rights for property or money, -- which the buyer pays or promises to pay to the seller...' compare the definition of 'sale' §1(2) of the Uniform Sales Act and in §2-106(1) of the Uniform Commercial Code. (Citations omitted).[22]

Mid-Louisiana argues[23] that every pipeline's delivery of its

---

[21] For example, §1-201(44) of the Uniform Commercial Code provides in pertinent part:

> ...a person gives "value" for rights if he acquires them
>
> ***
>
> (d) Generally, in return for any consideration sufficient to support a simple contract.

[22] See also, *Tenneco Oil Co.* v. *FEA*, 613 F.2d 298, 302 (TECA. 1979).

[23] Br. in Opp. 18.

own produced gas to a downstream customer must satisfy the statutory definition of a "sale" and of a "first sale." This argument is totally irrelevant. The issue is not whether there is a sale at some point in the complete transaction beginning at the wellhead of pipeline produced gas and ending with its delivery to a separate business entity which purchases the gas for valuable consideration. The true issue is whether a sale at the wellhead may be imputed to an intracorporate transaction where there is neither a buyer nor a seller and no consideration. We have shown that it cannot.

3. We argued[24] that this Court should issue a *per curiam* order reversing the Court below for erroneously vacating Order 98 merely because Order 58 was voided. Only one respondent addressed this issue.[25] It argued that since the Commission had based Order 98 on the theory that it had full jurisdiction over pipeline production under the provisions of the Natural Gas Act, the reversal of its "first sale" holding necessarily required reversal of Order 98. We do not disagree with this statement, but it clearly begs the real issue. That issue is whether an agency should be given the opportunity to recast a substantive rule it has made on the basis of an erroneous theory, or whether that administrative determination can be unlawfully ursurped by a Court. This error is patent here since the Fifth Circuit has held in both *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 380 (1981) and *Columbia Gas Development Corp.* v. *FERC*, 651 F.2d 1146, 1155-59 (1981) that the NGPA did not repeal or nullify the rate filing requirements of Section 4 of the Natural Gas Act as to independent producers. Thus, an independent producer cannot automatically collect NGPA prices, but must first satisfy the requirements of the Natural Gas Act. Surely, these restrictions on the right of independent producers to collect NGPA maximum ceiling prices must be equally applicable to pipeline producers. For, it is undisputed that sales of gas by independent producers are statutory "first sales." The mere fact that the Court below held pipeline producers to also be engaged in making such first sales, in the course of intracorporate transactions, certainly cannot afford the pipeline producer *greater* rights than are enjoyed by the

---

[24] Pet. 18-20.

[25] Kansas-Nebraska Br. in Opp. 27.

independent producer who was the express beneficiary of the higher incentive prices granted by NGPA.

4. We argued[26] that the decision below conflicts with *Pennzoil Company* v. *The Public Service Commission of West Virginia.*[27] Respondents argue[28] that no conflict exists because that Court affirmed the decision below without stating any grounds. None of the respondents addressed our argument that the State Court could have affirmed only on the single ground given by the State Commission which adopted the rationale of the Federal Commission here. It is well established that a court can sustain agency orders only on the basis of the agency's reasons, *Camp* v. *Pitts*, 411 U.S. 138 (1973), and may not substitute its own rationale for that of the agency. *S.E.C.* v. *Chenery*, 322 U.S. 194 (1947). All of the alternative grounds for decision advanced by respondents are mere *post hoc* appellate rationalizations. *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974). Therefore, a direct conflict between these courts exists on an important federal issue and this Court should take jurisdiction to resolve this conflict.

---

[26] AEPCO Pet. pp. 13-15.

[27] Supreme Court of Appeals of West Virginia, No. 80-175-G-42T (decided January 19, 1982). In this Court, that case bears Case No. 81-1672.

[28] e.g. El Paso Br. in Opp. 21-22.

CONCLUSION

For the foregoing reasons and those presented in our petition, it is respectfully submitted that AEPCO's petition for certiorari and motion for summary reversal should be granted. Alternatively, if both such requests are denied, we respectfully submit that this Court should summarily reverse the vacation of FERC's Order 98 by the Court of Appeals and direct that Court to remand Case No. 80-4010 below to the FERC for further proceedings.

Respectfully submitted,

*Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006

Attorneys for Arizona Electric
Power Cooperative, Inc.
*Counsel of Record

September 27, 1982

Certificate of Service

I hereby certify that on this 27th day of September, 1982, three copies of the foregoing Reply of Arizona Electric Power Cooperative, Inc., to Oppositions to Petition for Certiorari were mailed, postage prepaid, to all counsel of record.

Arnold D. Berkeley
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006

Attorney for Arizona
Electric Power Cooperative, Inc.